Supreme Court, U.S.
FILED

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Docket No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BENJAMIN J. ROSCOE,
Petitioner,

v.

CITY OF ALBUQUERQUE, et. al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN J. ROSCOE, PRO SE
PETITIONER, PRO SE
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ALBUQUERQUE, NEW MEXICO 87110
(505) 881-0662

40 pp

Question Presented

The question presented for review is whether the City of Albuquerque terminated a Housing Assistance Payments Contract (HAPC) with Appellant in accordance with the terms set forth in the HAPC.

PARTIES TO THIS PROCEEDING

The Petitioner respectfully certifies that the persons or corporations listed below may have an interest in the outcome of this litigation:

1. JACK KEMP, the former Commissioner of the United States Department of Housing and Urban Development (HUD).

2. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, an agency of the United States Government.

3. MICHAEL R. GRIEGO, the former manager of HUD's Albuquerque office.

4. CITY OF ALBUQUERQUE, a municipal corporation existing under the laws of the State of New Mexico.

5. MANUEL CORDOVA, the manager of the Section-8, Rental Assistance Program for the Albuquerque Housing Authority.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court

COMES NOW BENJAMIN J. ROSCOE, Petitioner, pro se, and petitions the Court for a WRIT OF CERTIORARI to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

City moved for summary judgment on grounds that Roscoe breached the HAPCs and therefore the HAPCs were terminated properly.

Roscoe's response to City's motion for summary judgment is that there is no evidence that he had breached any of the HAPCs.

The district court granted summary judgment in favor of City.

Roscoe appealed the district court judgment to the Tenth Circuit Court of Appeals arguing that City had terminated at least one HAPC without abiding by the terms set forth in the HAPC for termination of a HAPC by City.

The review of summary judgment is de novo.

The Court of Appeals affirmed the district court decision.

Specifically, and simply, the City terminated the HAPC for Mrs. Perea on April 3, 1991. See Appellant's Exhibit 1, attached hereto.

There is no provision in the HAPC

associated with Mrs. Perea's lease which provides for the renewal of that HAPC.

There is no expiration date set forth in Mrs. Perea's lease.

There were no circumstances present to cause the expiration of the HAPC for Mrs. Perea.

The City first notified Roscoe he had breached a HAPC on May 7, 1991. See Appellant's Exhibit 2, 2nd page, 4th para.

By refusing to continue the HAPC associated with Mrs. Perea's lease, the City repudiated the HAPC for Mrs. Perea and realized the termination of that HAPC.

Such termination of the HAPC was not pursuant to the terms set forth in Paragraph 13-B of the HAPC.

The summary judgment entered by the district court is misfeasance and it is an injustice.

The affirmation of the summary judgment entered by the Court of appeals is

misfeasance.

REASONS FOR GRANTING WRIT

As a direct and concise argument amplifying the reasons relied on for the allowance of the writ, Petitioner states as follows:

1.) This action was brought against a municipality for breach of contract in a state district court.

2.) The attorneys for both sides were forced to examine numerous inconsistent and imprecisely written HUD regulations and contracts with which they, the City, HUD, and the court were not familiar.

3.) The attorneys for both sides introduced additional, important, related but extraneous matters having to do with due process, property rights, HUD administrative actions, proceedings in other courts and procedural matters in the case.

4.) The district court judge lost sight of the underlying issue, did not have the

patience to wade through the quagmire into which the proceedings had fallen, and was unable to fairly decide the main issue which became obscure in the proceedings but which is simply presented herein.

5.) The Court of Appeals also did not bother itself with review of the lower court's decision, which review was de novo. The Court of Appeals merely echoed the lower court and it also failed to fairly decide the simple basic issue.

6.) The federal district court has so far departed from the accepted and usual course of judicial proceedings and the Court of Appeals has sanctioned such departure as to call for an exercise of the Supreme Court's power of supervision.

7.) The number of HAPCs in force each year over the next decade will continue to be in the millions. It is imperative that the federal courts be able to make legally correct decisions concerning actions brought for

breach of a HAPC with its attendant complexities. A restarting point from which such an objective may be furthered is at the District Court of New Mexico and The Tenth Circuit Court by granting this PETITION FOR WRIT OF CERTIORARI.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN J. ROSCOE, PRO SE
3005 SAN PABLO NE
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APPENDIX

District Court Order 12/2/93 ..... A-1

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

BENJAMIN and GERALDINE ROSCOE,

Plaintiffs,

vs.

CITY OF ALBUQUERQUE, et al.

Defendants ORDER

This matter came on for a hearing on December 1, 1993 on Defendant City's July 27, 1993 motion for partial summary judgement on Count I, Defendants City's August 27, 1993 motion for partial summary judgement on Count II, Defendant United States of America's June 23, 1993 motion to dismiss or alternatively motion for summary judgement, Defendant City's August 26, 1993 motion for sanctions, Defendant City's November 5, 1993 motion for relief regarding pretrial order, and Plaintiffs' July 9, 1993 motions for waiver of Local Rule 54.5 concerning attorney time records regarding fees. The Court, having heard the arguments of counsel, reviewed the

submissions of the respective parties and made its findings of fact and conclusions of law in open court; Wherefore, IT IS ORDERED, ADJUDGED AND DECREED that Defendants City's motion for partial summary judgement on Count I be, hereby is, granted.

IT IS FURTHER ORDERED that Defendants City's motion for partial summary judgement on Count II be, and hereby is, granted.

IT IS FURTHER ORDERED that Defendant United States of America's motion for summary judgement be, and hereby is, granted.

IT IS FURTHER ORDERED that Defendant City's motion for sanctions be, and hereby is, granted. Defendant shall submit an affidavit, in verified form, of costs to include the number of hours devoted to Plaintiffs' failure to comply with the Court's August 11, 1993 order to produce documents, together with Defendant's hourly rate shown to be reasonable based upon community standards. Plaintiffs will be allowed to

respond to Defendant's affidavit within three (3) day of its receipt.

IT IS FURTHER ORDERED that the Defendant City's motion for relief regarding pretrial order be, and hereby is, granted. Within thirty (30) days of the date of entry of this order, Attorney Johnson shall pay to the Court registry three hundred dollars ($300.00) and shall advise the Court that the money has been deposited. Further, within thirty (30) days of the date of entry of this Order, Attorney Johnson shall submit to the Court a five hundred (500) word essay discussing "Candor Toward the Tribune," Rule 16-303 of the Rules of Professional Conduct.

IT IS FURTHER ORDERED that Plaintiffs' July 9, 1993 and July 13, 1993 motions for waiver of Local Rule 54.5 be, and hereby are, moot.

DATED this 2nd day of December, 1993.

_____

Chief Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BENJAMIN ROSCOE,

Plaintiff-Appellant,

and

GERALDINE ROSCOE.

Plaintiff,

v.

CITY OF ALBUQUERQUE, MANUEL CORDOVA, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, JACK KEMP, and MICHAEL GRIEGO,

Defendants-Appellees.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34 (a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

Benjamin Roscoe, an Albuquerque landlord, appeals pro se from an entry of summary judgment dismissing his complaint against the City of Albuquerque, the United States Department of Housing and Urban Development ("HUD"), and others, for alleged breach of contract and civil rights violations in connection with the city's decision to discontinue renewing its federally subsidized Housing Assistance Payment Contracts ("HAP contracts") with Roscoe. 1 He contends that the district court misinterpreted the HAP contracts; that the contracts were terminated prior to their expiration rather than simply not renewed as the district court found; and that genuine issues of fact exist as to whether the city breached the contracts and violated his civil rights. We affirm.

From 1988 to 1992, Roscoe participated in the Section 8 Lower Income Housing Assistance Program, a rent subsidy program managed by the city, through the Albuquerque Housing

Authority ("AHA"), with funding from HUD. Under this program, Roscoe would receive part of each month's rent for his sixty or so Section 8 tenants from the AHA, pursuant to the terms of HAP contracts executed for each Section 8 Tenant. The HAP contract sets forth the respective amounts to be paid by the tenant and the AHA, and provided that the tenant's rent payment as listed is the maximum amount the tenant shall be required to pay for rent, including "all services, maintenance and utilities to be provided by the owner," and any

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Roscoe was joined in the complaint by his wife, Geraldine. She neither joined in Mr. Roscoe's notice of appeal nor filed her own, and thus she has waived her right to appeal the summary judgment entered against her.

changes in that amount must be pre-approved by the AHA. R. Vol. III, Tab 159, Ex. 2 to Ex. at 3(B).

In February of 1991, the AHA began

investigating numerous allegations by some of Roscoe's Section 8 tenants that he was assessing them extra charges for management and maintenance services. The AHA conducted an investigation using information provided by Roscoe and determined that at least some of the allegations had merit. The AHA subsequently informed Roscoe that it would not renew its HAP contracts with Roscoe as they individually expired. Some of Roscoe's tenants eventually prevailed in a class action lawsuit that they had filed in 1990 alleging misconduct by Roscoe similar to that found by the AHA.

Roscoe then brought this action alleging that the city breached its contracts and violated due process in terminating its HAP contracts with him, and that it violated his Fourth Amendment rights in investigating his records. He was represented by counsel in the district court proceedings. The district court dismissed all counts on summary

action. Further, Count I is barred by the doctrine of sovereign immunity.

Count II fails because plaintiffs offered only conclusory and non-specific allegations to counter . . . the qualified immunity defense.

The material derendants put forward indicate the manner in which they conducted the limited denial of participation process was objectively reasonable. Plaintiffs have offered only conclusory allegations in response, that in its decision-making, the Federal defendants relied upon some secret findings from the city.

R. Vol. IV at 21-22.

We review an order granting summary judgment de novo,

applying the same standard used by the district court under Fed. R. Civ. P. 56(c). Notari v. Denver Water Dept., 971 F.2d 585, 587(10th Cir. 1992). Summary judgment is appropriate when "there is no genuine issue as

to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. p. 56(c). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly prelude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Redmon ex rel. Redmon v. United States, 934 F. 2d 1151, 1155 (10th Cir. 1991).

The dispositive issue with respect to Roscoe's first two claims against each defendant is whether the city terminated the HAP contracts prior to their expiration, or whether the city simply allowed them to expire and chose not to renew them. If the latter is true, then unless Roscoe had a contractual or statutory right to renewal, his claims for breach of contract and due process violations fail as a matter of law. See Brown v. Independent School Dist. No. I-06, 974 F.2d

1237, 1239 (10th Cir. 1992) (there is no property interest in the renewal of an annual contract absent a statutory or contractual right to renewal).

The undisputed facts show that the city informed Roscoe on May 7, 1991, that it would not renew "those H.A.P. Contracts with]Roscoe[" until the LPD expired. Id. The city explicitly stated it was opting to let each HAP contract "run out" rather than terminating each one immediately. Id. at 4. Accordingly, the district court based its decision in part on its finding that the city exercised its right not to renew the contracts instead of terminating them prior to their expiration.

Roscoe essentially rests his claim of a property interest and of a breach of contract on his assertion that "the]HAP contracts[have no provision for renewal nor do the expire." Appellant's Reply Brief (City) at 17. The HAP contract, however, clearly states that it expires at the conclusion of the lease

on which it is based, or at the termination of the AHA's reimbursement contract with HUD. R. Vol. II, Tab 159, Ex. A, 2.

Having carefully reviewed the briefs and the record in this case, we conclude that summary judgment was appropriate for substantially the reasons stated by the district court.

AFFIRMED. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Stephen H. Anderson

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BENJAMIN ROSCOE,

Plaintiff-Appellant,

and

GERALDINE ROSCOE,

Plaintiff,

v.
No. 93-2338

CITY OF ALBUQUERQUE, MANUEL CORDOVA, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, JACK KEMP, MICHAEL R. GRIEGO,

Defendants - Appellees.

ORDER
Entered June 6, 1994

Before MOORE, ANDERSON, and KELLY, Circuit Judges.

This matter comes on for in consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35 (b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rulesof Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: Deputy Clerk

CITY OF ALBUQUERQUE

Josephine Perea

5328 Montgomery Blvd. |2305

Albuquerque, NM 87109

Dear Section 8 Participant:

The Albuquerque Housing Authority will not renew the Housing Assistance Payments Contract with your landlord, Mr. Ben Roscoe. If you wish to continue receiving assistance under our Program, please come into our office to receive your Certificate of Family Participation no later than the expiration date of your lease Agreement.

If you wish to remain in the unit, please understand the Housing Authority will not be responsible for the rental assistance payments after housing Assistance Payments Contract expires.

If you have any questions, please contact Lotetta Gonzsales. 764-3906.

Sincerely,

Manuel Cordova

Section 8 Manager

xc: Ben Roscoe

File

MC/lg

CITY OF ALBUQUERQUE

S. Austin Johnson, Esq.

5801 Osuna Road, N.E. Suite 102

P.O. Box 91658

Albuquerque, NM 87199-1658

Re: Benjamin & Geraldine Roscoe, Brook Apartments Dear Mr. Johnson:

I am in receipt of your letter dated April 3, 1991, to Manuel Cordova, Section 8 Program Manager. I apologize for the delay in responding to your letter.

As you are aware, on February 11, 1991, the U.S. Department of Housing and Urban Development ("HUD") issued a notice of limited denial of participation (L.D.P.") to Benjamin and Gereldine Roscoe. Thereafter, on April 12, 1991, HUD affirmed the L.D.P. with regard to the Brook Apartments based upon "irregularities" in Roscoe's operation and maintenance of the units, including excessive charges to tenants in violation of the Housing Assistance Payments.

("H.A.P.") Contract and the Assisted Lease Agreements ("A.L.A.").

Pursuant to the federal regulations, an L.D.P. is defined as an "action taken to immediately exclude from participation, or to immediately impose conditions on the participation, of any person in a program or programs of the Department within a limited geographical area." See, 24 C.F.R. Section 24.105(aa). The regulations further state that an L.D.P. sanction "shall be effective immediately upon issuance, and shall remain effective up to 12 months thereafter." See, 24 C.F.R. Section 24.710(b).

We have been advised by Regional Counsel for HUD that the City of Albuquerque, the Housing Authority, and any officials of the City and Housing Authority could be in violation of HUD regulations and subject to person in connection with a covered transaction. See, 24 C.F.R. Section 24.305(c) (knowingly doing business with a debarred, suspended, ineligible,

or voluntarily excluded person, in connection with a covered transaction is cause for debarment). Additionally, a violation of this restriction may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies. See, 24 C.F.R.

Insofar as the Albuquerque Housing Authority is subject to debarment if we knowingly do business with the Brook Apartments, we do not intend to enter into any new H.A.P. Contracts with your client until such time as twelve months has elapsed, or the official imposing this sanction terminates it, whichever occurs first.

With regard to those H.A.P. Contracts which come up for renewal between now and February 11, 1992, please be advised that the A.H.A. does not intend at this time to renew said Contracts for the following reasons. First, it is the A.H.A.'s position that the federal regulations prohibit us from renewing

or extending any and all covered transactions with any person who is debarred, suspended, ineligible, or voluntarily excluded. See, 24 C.F.R. Section 24.220(b) ("agencies and participants shall not renew or extend covered transactions ... with any person who is debarred, suspended, ineligible, or voluntarily excluded...").

Second, the A.H.A. has made an independent determination that the Roscoes have breached certain provisions of the H.A.P. Contracts. The breaches are as follows:

1- The Brook Apartments has repeatedly charged/fined Section 8 tenants for "bad behavior". Our February 14, 1991 audit of the books and records of the Brook Apartments revealed numerous invoices and bills for bad behavior, including, but not limited to, the following:

a) Management having to handle complaints about screaming and fighting- $15.00;

b) Management having to handle a man seen in the hallway who scared other tenants-$25.00;

c) Disturbing tenants with arguing and fighting-$20.00;

d) Guests throwing a cigarette, beer bottle and urinating on the property-$50.00;

e) Child throwing fireworks off balcony-$20.00;

f) Unsupervised children-$20.00.

The Brook Apartments has also charged Section 8 tenants an investigation fee and/or management fee ranging from $35.00 to $90.00.

As set forth in my letter of February 1, 1991 to your client, the A.L.A. does not permit charging tenants for bad behavior or charging a management fee. Specifically, Section 3(A) of the H.A.P. Contract sets forth the total monthly

rent, or Contract rent, payable for a particular Section 8 tenant. Section 3(B) states that the portion of the Contract rent payable by the family is the "maximum amount the Owner can require the Family to pay for rent of the Contract unit, including all services, maintenance and utilities to be provided by the Owner in accordance with the Lease." Furthermore, pursuant to Section 5 of the H.A.P. Contract, Roscoe agreed that his endorsement of the assistance payment check shall be a certification that he has not received and will not receive, except for the housing assistance payment and the tenant rent, any payments or other consideration from the family as rent for the Contract unit. Finally, HUD Handbook No. 7420.7 at Section 9-12(d) defines "program abuse' as collecting extra or side payments in excess of the family's share of the rent.

2- The Brook Apartments consistently charges more rent for assisted units as compared

with unassisted units. For example, in 1990 Roscoe requested numerous one bedroom units receive a rent increase from approximately $359.00 to $370.00 per month. However, the ledger cards for comparable unassisted units show that even as recent as January, 1991, a market tenant could rent a one bedroom unit for $349.00 per month. The H.A.P. Contract states that rent adjustments shall not result in material differences between the rent charged for assisted and comparable unassisted units as determined by the A.H.A. Pursuant to Section 13(B) of the H.A.P. Contract, the A.H.A. is excising its right not o renew those Contracts which come up for renewal between now and February 11, 1992. Please note that rather than terminate each and every Contract effective immediately, the A.H.A. is choosing to let the Contracts "run out" as annual recertifications /reexaminations occur, and not renew said Contracts for another term. However, based upon the above listed violations,

the A.H.A. is reserving its rights, pursuant to Section 13(B) of the H.A.P. Contracts at any time in the future. In the event we decide to immediately terminate the existing Contracts, we will notify you.

If you have any questions or comments, do not hesitate to contact me. Any future correspondence should be referred to this office and not the A.H.A.

Sincerely,

Susan H. Biernacki

Assistant City Attorney

/sb

c:Malcolm DeVesty, Gov't Operations Division Head

Robert H. McLaughlin, Housing Manager

Manuel Cordova, Section 8 Program Manager

Michael Griego, Manager, Albuquerque Office, HUD

Cindy Kennedy, Chief Housing Management, Albuq. Office, HUD

Section 13. (B).

If the PHA determines that a breach has occurred, the PHA may exercise any of its rights or remedies under the Contract. The PHA shall notify the Owner in writing of such determination, including a brief statement of the reasons for the determination. The notice by the PHA to the Owner may require the Owner to take corrective action (as verified by the PHA) by a time prescribed in the notice. The PHA's rights and remedies under the Contract include recovery of over payments, termination or reduction of housing assistance payments, and termination of the Contract.